

The District Attorney and the Accused

By ARTHUR TRAIN.

IT is easy to grumble. Yet the office of District Attorney has so vital an influence upon the respect in which our institutions are held that we have a right to hold those who occupy it to a high standard of industry, sobriety and self-restraint. The District Attorney does not need to be a great lawyer. One capable law clerk can furnish most of the "dope" for a staff of assistants who rarely open a book—even the Penal Code. Ninety per cent. of the actual work of the office is the exercise of mere common sense. The majority of cases practically "try themselves." The complainant tells his story in more or less his own way, the defendant denies it or "stands pat." The Judge charges the jury. They usually convict. There is no real legal or trial ability required. And it goes on, day in, day out—the mills of the courts grinding out convictions, with few acquittals, the year round.

Contest of Fact, Not Law.

The idea that criminal law is peculiarly difficult or complex is unfounded. There have, it is true, been many hair splitting refinements made by the bench, particularly in the old days when the penalties were so terrible that even judges sought to mitigate the atrocity of the law by giving the defendant another chance when they could. But in our criminal courts to-day the contest is usually one of fact, not of law. The cases are of the "knock down and drag out" variety. Courtesy, courage, broadmindedness and scrupulous integrity are needed rather than legal ratiocination. It is merely a question of bringing out the evidence, and it is not inconceivable that a substantial percentage of criminal proceedings would be facilitated if the District Attorney did not appear at all. One often writhes with mental agony when forced to listen to some youthful deputy blundering well meaningly through a case, interrupting with unnecessary questions just as the witness gets well started on his story, and fighting to exclude evidence that either is so inconsequential that it is better to let it in instead of wasting time in trying to keep it out, or is in fact beneficial to the People's case. Most criminal prosecutions—I mean the ordinary cut and dried police cases—are little more than matters of form. Crank the machine and it goes along of itself. If the District Attorney isn't at hand to ask the witness "Well, and what happened next?" the Judge does it for him.

As a matter of fact, the Assistant District Attorney who, for nearly a generation, was as much a fixture in "Part One" as the jury box itself, was afflicted with a physical ailment that made it almost impossible for him to keep awake except when actually on his feet. He would question a witness and, having done so, sit down while the defense was cross-examining and peacefully doze off until it was time to call the next. Sometimes he would wake up and sometimes wouldn't. But things went along quite all right just the same, and because the jury perceived that he had no personal axe to grind and was a good natured person of generous impulses, they usually found the defendant guilty. Indeed, as I recollect it, the percentage of convictions to cases "tried" by this assistant was the highest in the entire office, yet from a theoretical point of view he was a very bad prosecutor indeed, since a large part of the time he was sojourning in the land of dreams.

About three-quarters of all cases are disposed of, not by actual trial, but by pleas of guilty, by direction of the court or by "recommendation" of the District Attorney, who makes written application on the back of the indictment either that the defendant's bail be discharged or that the indictment itself be dismissed. The usual grounds upon which such recommendations are based are that the People's witnesses have disappeared or moved out of the jurisdiction, or that vital evidence is lacking, that the case has been tried once already and that the jury were almost unanimous for acquittal, or that examination shows that a reasonable doubt as to the defendant's guilt clearly exists on the evidence, and that for this reason the case should not be submitted to a jury—in other words, that it is an "Assmanshausen." A careful study of the written recommendations upon the backs of the indictments on file in the record office of the District Attorney would probably indicate what proportion of indictments filed during the terms of the respective incumbents should never have been found at all. Of course this inference would not be quite as strong where Dis-

trict Attorney B. recommends the dismissal of indictments found by District Attorney A., but where B. recommends the dismissal of those found by himself, the query is pertinent as to why he should have submitted the matter to the Grand Jury in the first instance if he was eventually to change his mind about prosecuting the offense.

The "All Highest" Prosecutor.

There is a natural tendency for the district attorney to substitute himself for the jury, and, on the one hand—if he thinks that the indictment should not have been found, or perhaps, even that he cannot convict—to ask for a dismissal, or, on the other, if the case appeals to him, to strain the ethics of his office a bit to secure a verdict of guilty. A prosecutor, knowing that his intentions are honorable, may quite unconsciously usurp most of the functions of the entire court, become an autocrat, and leave others little or nothing to do. If the judge allows this, the district attorney is apt to become blinded by his own importance, and feel that whatever he may do is justifiable, because he is on the right side. Thus, he may use the authority of his official position improperly to influence the jury or employ methods to trick or embarrass the defense, which do him little credit and tend to reflect upon his office and the whole administration of criminal justice.

The temptation to play fast and loose with a crook who has taken the stand in

Assistant "D. A." Has Every Advantage.

Certainly the young assistant district attorney has every advantage—not the least among them being that he can speak his own language and so convey his ideas to the jury—something not always the case with his opponent. And, then, do not the jury already know that the de-

fendant is guilty, because this innocent looking youth, whom the court addresses as "Mr. District Attorney," has told them so? Of course, they do! And they know if they don't convict when they ought the judge will probably read them the riot act and hold them up to public contumely. They are also aware that the Grand Jury has indicted the defendant, and that presumably he was caught by the police "with the goods" in the first place. The judge can talk until he is black in the face about "presumption of innocence" and "reasonable doubt," but they will take it all in the Pickwickian sense. They continue to be reasonable men even after becoming jurors. They cannot seriously imagine that after the evidence has been sifted from three to six times by different judicial and semi-judicial officials the chances are anything but overwhelmingly against the defendant's innocence.

His own "defense" or who has had some dullard of the criminal bar assigned to protect him, to fight fire with fire, and to beat the shyster at his own game, is enough to make a young deputy district attorney forget that to preserve the standard of official conduct is more important than to send a burglar to jail. The outrages sometimes committed by youthful (and other) prosecutors in an enthusiastic desire to see that no guilty man shall escape have doubtless caused many a chuckle to Judge Jeffreys and Torquemada on the further side of the Styx. For the D. A. can do in court with comparative immunity things which in a defendant's counsel would bring the judge down upon him like a ton of brick. If he is caught offending it is easy for him to explain that he simply "forgot" or was "honestly mistaken."

confidence and esteem engenders a sense of "team play," leaving the stranger defendant at a hopeless disadvantage. All the more, under these circumstances, does good sportsmanship demand that, no matter what tactics the defense pursues, the prosecutor must keep his own armor unsullied—and play absolutely fair. Frequently this is hard work. When some artificial rule excludes a piece of vital and conclusive hearsay evidence—that the defendant was seen immediately after the homicide carrying a smoking pistol, for example—it may well seem at the moment justifiable to get the fact before the jury by hook or by crook. And there are a thousand ways of doing this—in the opening address, which the court says is "not evidence," but which the jury is apt either to accept in lieu of it or to confuse with it; by innuendo in the asking of questions "proper" or "improper"; through the mouth of an impulsive but disingenuous "cop" who just can't help blurt it forth, although it be immediately "stricken out" by the judge; or, if the devil has been busy, by simply saying it yourself so that the jury can hear you.

But there are even more subtle ways to carve the entrails of a defendant, particularly if he takes the stand as a witness in his own behalf. One of these is by questioning him as to his "record." You can ask him almost anything you like. Anyhow, you are permitted under the guise of "testing his credibility" to accuse him of every crime on the calendar merely by having him deny each one of them *seriatim*. You are "bound by these answers," of course. That is just another of the law's little ironies. For if you look and talk like a gentleman the jury assumes that you wouldn't have asked the question if the charge were not true. Whatever he says, they believe he did it. His "No" is worth nothing against your presumptive honesty. Thus, if you ask a defendant questions which are not based on known and provable fact you may be in effect bearing false witness against him in a most dastardly way.

Nine times out of ten—perhaps ninety-nine times out of a hundred—no harm results, but the hundredth time somebody is knifed in the back—that unfair and unjust question is what turns the scale in the jury's mind against him. They are probably going to think him a good deal worse than he really is, anyway. Do not increase the presumption, heavy enough against him already, by smearing him with mud that is not his.

When all is said and done, unless the young prosecutor sets an example of just dealing, high integrity and sincerity, his years of service—his best years—will be thrown away. For in that example—the good deed shining "in a naughty world"—amid the sordid surroundings of crime and poverty, of coarse brutality and cynicism—lies his greatest opportunity for public service. At first he is exhilarated by the consciousness of his own supposed intellectual and social superiority. Court officers, policemen, detectives and office hirelings pat him on the back, flatter him and try to induce him to believe that he is the cleverest trial lawyer, the most astute prosecutor, the most eloquent orator of the decade. He is in fact a big fish in a pool of not inconsiderable size. "He dreams of a political career, or, at the least, of an office crowded with wealthy and influential clients drawn there by his reputation as a prosecutor. He is blinded by blarney, stultified by syco-



A courtroom scene in a celebrated murder case.

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